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Supreme Court of the United States

October Term, 1972

72-661

JAMES LEDES,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Supreme Court of the United States

October Term, 1972

JAMES LEDES,

Petitioner,

—against—

THE STATE OF NEW YORK,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered June 1, 1972.

Judgment Below

The Court of Appeals affirmed the order of the New York Supreme Court, Appellate Division, First Department on June 1, 1972 without opinion, 30 N.Y. 2d 816, 334 N.Y.S. 2d 909 (1972). The order of the Appellate Division affirming the judgment of the New York Supreme Court, Bronx County, was entered on June 29, 1971, also without opinion, 323 N.Y.S. 2d 641 (1st Dept. 1971). The orders are printed in the Appendix to this petition (A. 1a).*

* References to the Appendix will be preceded by the letter "A".

Jurisdiction

The judgment of the New York Court of Appeals was entered on June 1, 1972 (A. 1a). An order extending time to file this petition to September 30, 1972 was signed by Mr. Justice Marshall and entered on August 29, 1972 (A. 2a); a similar order further extending time to October 30, 1972 was signed by Mr. Justice Marshall on September 20, 1972 (A. 3a). This petition is being filed within the time permitted under Rule 22(1) of the Rules of the Supreme Court as extended by orders of this Court. The Court's jurisdiction is invoked under Title 28, United States Code, Section 1257(3).

Question Presented

Should this Court let a conviction stand where Petitioner's fundamental right to a fair trial was denied by the combination of an inflammatory and prejudicial summation by the prosecutor and by seriously erroneous rulings by the Trial Court?

Constitutional Provision Involved

Fourteenth Amendment to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

1. Introduction

Petitioner, after a trial by jury on 12 counts of a 14 count indictment for criminally buying and receiving stolen property and criminally concealing and withholding stolen property in violation of former New York Penal Law § 1308, was convicted and sentenced to a term of two and one-half to four years in prison.

The leading witness for the prosecution upon whose testimony the conviction of Petitioner principally depended, was Joseph Arrighi, an admitted accomplice, as to whom the prosecutor promised to dismiss the charges in return for his testimony.

Four persons were allegedly involved in the incidents charged in the indictment—Arrighi, co-defendants Esposito, Bell and Petitioner. Esposito, a friend of Petitioner's, died before the trial; Bell was convicted with Petitioner.

The facts can be divided into two distinct categories, spanning a period of three days. The first phase related to the arrival of a truck driven by Bell containing the alleged stolen garments worth approximately $15,000 at Arrighi's apartment on July 6, 1967, the removal of the goods by Esposito, Bell and Arrighi to the apartment and arrangements between Esposito and Arrighi as to the use of the apartment. This phase did not involve Petitioner and need not be detailed here.

The second phase pertains to the arrival of Petitioner at the apartment with Esposito—a friend of Petitioner's—allegedly on July 6, after the goods were unloaded, his alleged discussion with Esposito as to the purchase of the goods, the alleged removal by him of some of the garments on that occasion and his return with Esposito on July 8. When Petitioner returned, the police were at the apartment and Esposito, Arrighi and Petitioner were arrested.

Petitioner took the stand in his own defense, maintaining innocence of the crimes charged. His version of the events sharply conflicted with that of Arrighi. Indeed, the principal issue presented for the jury's determination was the credibility of Arrighi and Petitioner as to the contrasting versions presented.

2. The Accomplice's Testimony as to the Alleged Involvement of Petitioner

Arrighi claimed that on July 6 Esposito told Petitioner in his presence at the apartment that the merchandise was worth about $40,000, but that he would sell it for $4,000. Arrighi claimed that they then agreed on the price—$4,000—and Petitioner allegedly gave Esposito $600, as an advance.

Arrighi testified that Petitioner and Esposito then assorted some merchandise for samples which Petitioner allegedly wanted to show prospective buyers. Arrighi went out to a closed supermarket to pick up some empty cartons, two of which were packed with a small amount of merchandise. Arrighi, Petitioner and Esposito carried them downstairs, putting the cartons in the trunk of Petitioner's car.

Esposito, according to Arrighi, never mentioned that the goods were stolen and had shown Petitioner bills of lading.

3. Arrival of the Police and Arrest of Petitioner and Esposito

On Saturday, July 8th, the police, presumably acting on a tip, entered Arrighi's apartment allegedly with Arrighi's permission, and asked him if he knew where the merchandise came from. Arrighi said they belonged to "Jimmie and Eddie."

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While the police were talking to Arrighi, Petitioner and Esposito entered the building carrying unconstructed brown cartons. The police asked Petitioner and Esposito what they were doing there, to which Petitioner responded that he heard he could get a "good buy." Petitioner and the others were thereupon arrested.

4. Testimony of Petitioner

At the time of trial, Petitioner owned a business in Manhattan called Honor Copystat Company. On July 8, 1967, he was the President of Superior Machine Woodcarving Company, where he worked with four employees. He is married and has three daughters.

On the evening of July 6, Esposito—whom Petitioner had known for about a year—came to Petitioner's house and asked him to take a ride with him. He said he was going to meet a friend of his whom he said had women's clothing purchased at a closeout. They went to a restaurant and Arrighi—whom Petitioner did not know—arrived shortly thereafter.

Arrighi met Esposito outside of the restaurant, where they conversed for a couple of minutes in a low tone, out of Petitioner's hearing.

At the restaurant, Arrighi mentioned that certain clothing was available and asked whether Petitioner wanted to buy some for his wife and children. He said that Petitioner should come to his apartment before the weekend was over because he intended to sell the merchandise by then.

Petitioner was planning at the time to go on vacation with his wife and children and thought it would be nice for them to have some new clothes. He said he would speak to his wife and let Esposito know.

They did not go to Arrighi's house that night. Instead, Esposito drove Petitioner home in his car, requesting that he ask his wife what she wanted and stating that he would come by or call and might work something out.

Esposito came to Petitioner's house on the evening of July 8. Petitioner had, in the meantime, spoken to his wife the night before and she was agreeable to his purchasing some shorts, slacks or blouses. He told his wife that it was a closeout, as he had been informed.

Petitioner and Esposito then drove to Arrighi's house, took some cartons from Esposito's car and went upstairs to the waiting police. The police asked what Petitioner was doing there and he said "I heard there was something to buy for my wife and kids there" and "I'm sorry, I'm really sorry", whereupon he was arrested.

Petitioner steadfastly denied having been to Arrighi's premises prior to that night, that he had ever paid Esposito for any clothing in Arrighi's premises, and that he knew the items were stolen clothing.

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Reason for Granting the Writ

The cumulative effect of an inflammatory summation by the prosecutor, and errors by the trial court in the restriction of cross-examination of the accomplice, in denying the receipt of irrelevant evidence and the charge to the jury denied petitioner his fundamental right to a fair trial and Due Process of Law.

A. The Summation of the Prosecutor was Highly Inflammatory and Prejudicial

The summation by the prosecutor, we submit, was highly inflammatory and prejudicial, transcending all established bounds of propriety. The errors committed included the following: (1) the prosecutor unfairly imputed a criminal disposition to petitioner; (2) the prosecutor injected himself personally, vouching for the credibility of the State's witnesses and backed his position with the prestige of the District Attorney's office and the Police Department; (3) the prosecutor relied on matters totally outside the record, indulged in gross speculation and rank conjecture, made unfair comment on the evidence and drew wholly unjustified inferences.

1. Imputation of Criminal Disposition to Petitioner

The prosecutor made repeated and emphatic allusions to Petitioner as an unsavory character, converting the legitimate use of Petitioner's one prior conviction—for a minor gambling offense—as relating solely to credibility, to attempt to have the jury draw the improper inference that Petitioner was a bad man with a propensity to commit the crime at bar. The prosecutor said:

> "Another consideration, you have to look at a man's *criminal background*. Does a man have prior conflict with the law? Again, *James Ledes fits the bill*" (emphasis supplied).

The intention of the prosecutor in utilizing Petitioner's prior record for improper purposes was further made apparent when he told the jury that "the People don't go into this type of case without investigating a man"—thereby also indicating that, in indicting Petitioner, they relied upon the impermissible inference that if he committed a prior crime, it demonstrated a criminal disposition and propensity to have committed the instant crime.

2. Personal Prestige of the Prosecutor, his Office and the Police

In his zeal, the prosecutor vouched for his witnesses' credibility and backed them up with all the prestige that he could muster—of himself, the District Attorney's office and the police.

The conflicting issue of fact for resolution by the jury hinged upon the credibility of Arrighi vs. Petitioner. The prosecutor repeatedly put himself on the line as a guarantor of Arrighi's credibilty, telling the jury "you bet he was telling the truth" and that "you could bet your bottom dollar they were illegitimately in this business."

In like vein, the prestige of his office was invoked by telling the jury:

> "Well, the People don't go into this type of a case without investigating a man and conducting an investigation".

After objection was sustained, he went right back to telling the jury that it "can infer that the People are well-prepared in this particular case". The additional evil inherent in this statement is the implication that once the District Attorney indicts, guilt is conclusively established; and further that the prosecutor is aware of additional facts which were not made known to the jury.

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3. Other Unfair Inferences from the Proof

In addition to the improper comment by prosecutor noted above, we also point to the following aspects of the summation where the prosecutor made unfair comment on the evidence:

(1) Petitioner testified that he previously had a cabinetry business and later admitted that his father also had an interest in the business. Grasping on this straw, the prosecutor sought to depict Petitioner as a liar, stating on the basis thereof:

> "Another deliberate falsehood, another indication of his failure to tell the truth. Another factor for you to consider, of whether he is the type of man to tell the truth under oath, in this type of a case."

This was a magnification out of all proportion of a family relationship where Petitioner could legitimately state—without being branded a liar—that notwithstanding the mutual interest of his father, he was the owner.

(2) Contrary to the record, Petitioner was accused of another "deliberate lie" in regard to his plea of guilty to the unauthorized use of a vehicle. He was asked on direct examination as to whether he was previously *"convicted"* of a crime and mentioned a juvenile offense involving gambling. The prosecutor, however, referring to the direct examination, accused him of not having answered truthfully and made a big issue over the fact that the plea did not come to light until it was asked—improperly—on cross-examintion. This is contrary to the record and eludes the distinction in law between a conviction and a plea of guilty. The conviction had not yet materialized—and in fact, as of the time of sentence, Petitioner was in the process of moving to withdraw the prior guilty plea. This was the obvious reason for Petitioner's answer on direct examination and the prosecutor took unfair advantage of the circumstances and compounded the error in permitting inquiry concerning the plea of guilt.

Moreover, although it is a well recognized principle of law that a defendant who takes the stand can have his credibility impeached by a showing of prior convictions, *McGautha* v. *California*, 402 U.S. 183, 216 (1971); *Spencer* v. *Texas*, 385 U.S. 554, 561 (1967), in order to use a prior conviction for impeachment purposes the conviction must be final. See *United States* v. *Semensohn*, 421 F.2d 1206, 1208 (2d Cir. 1970); *Newman* v. *United States*, 331 F.2d 968, 972 (8th Cir. 1964), *cert. denied*, 379 U.S. 975 (1965); *Fenwick* v. *United States*, 252 F.2d 124, 126 (1958); *Beasley* v. *United States*, 218 F.2d 366, 368-9 (1954), *cert. denied*, 349 U.S. 907 (1955); *Campbell* v. *United States*, 176 F.2d 45, 47 (D.C. Cir. 1949).

B. The Rulings of the Court Below in Limiting the Admission of Prior Inconsistent Statements of the Accomplice were Erroneous and Grossly Prejudicial to the Defense

Petitioner was further deprived of a fair trial by reason of certain rulings of the trial court—particularly those involving prior inconsistent statements of Arrighi given to the attorney of Petitioner.

Prior to the trial, Petitioner's trial counsel advised the court that Arrighi had been in to see him soon after the original indictment was returned and made certain exculpatory statements to him as to Petitioner, in Petitioner's presence, after counsel told Arrighi he could not represent him. Defense counsel accordingly sought to cross-examine Arrighi as to the statements made by him, but, on objection by the prosecutor, who invoked the attorney-client privilege on Arrighi's behalf, the substance of the conversation was not permitted.

We maintain that this was serious error. The statements made by Arrighi contrary to his testimony at trial—and before any promise had been made to him by the District

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Attorney—were singularly important to impeach his credibility and corroborate the version of the facts adduced by the defense. Because there was no attorney-client relationship between Arrighi and the lawyer and because Arrighi made the exculpatory statements in the presence of a third party, it was clear that the attorney-client privilege did not apply under New York law, *Bauman* v. *Steingester*, 213 N.Y. 328 (1915).

C. The Court Erred in its Charge to the Jury

1. Criminal Intent

The Court instructed the jury on the issue of criminal intent as follows, in relevant part:

> "Guilty knowledge means *not only actual knowledge but also constructive knowledge,* and this may be shown by the establishment of circumstances from which guilty knowledge may be fairly inferred." (emphasis added).

Exception was taken to this aspect of the charge which, we submit, is at variance with established state law as to the knowledge required (*People* v. *Prince*, 19 App. Div. 2d 730, 242 N.Y.S. 2d 379, 380 [2d Dept. 1963]; *People* v. *Checkman*, 284 App. Div. 44, 129 N.Y.S. 2d 869, 870-1 [4th Dept. 1954]). The "correct test is *actual* knowledge, not negligence in failing to make resonable inquiry". (*People* v. *Prince, supra.*) "A finding of carelessness, negligence or indolence in investigation is not a substitute for guilty knowledge". (*People* v. *Checkman, supra.*)

2. Interest of the Accomplice

The court gave the standard simple state instruction that the testimony of Arrighi, as an accomplice, must be examined very closely and received with great caution.

We submit, however, that this was not nearly sufficient because the jury was instructed as to Petitioner—whose credibility was pitted against Arrighi's—that he had an interest in the outcome of the case; and that if his testimony was "in conflict with the testimony of other witnesses", the jury had a right to determine that there was "inducement" for him to "testify falsely".

In the interest of fairness, the same should have been indicated as to Arrighi. He had as much, if not more at stake than Petitioner in testifying falsely so as not to alienate the prosecutor and ensure that the charges against him were dismissed in effectuation of the bargain made.

* * * * *

This case warrants review by this Court, not necessarily because any one of the errors alluded to above violated Petitioner's fundamental right to a fair trial, but, rather, because the cumulative effect of all the errors, particularly the overbearing summation by the prosecutor, infected the proceedings to such an extent that there was a clear denial of Due Process guaranteed under the Fourteenth Amendment.

Due Process is violated whenever a conviction in a criminal trial is obtained in such a manner as to offend those principles of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental". *Snyder* v. *Commonwealth of Massachusetts,* 291 U.S. 97, 105 (1934); *Rochin* v. *People of State of California,* 342 U.S. 165, 169 (1952). *See, also, Betts* v. *Brady,* 316 U.S. 455, 462 (1942), where the test used in reviewing procedures during a state criminal trial was whether or not there was "a denial of fundamental fairness, shocking to the universal sense of justice. . . ". Where a criminal proceeding in state court contains prosecutorial statements which are not only inflammatory but contain unfair inferences from the facts in evidence together with prejudicial rulings by the trial

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judge, as here, the totality of these circumstances meets the test laid down in the above-cited cases. *See also, Mooney* v. *Holohan,* 294 U.S. 103 (1935); *Burwell* v. *Teets,* 245 F.2d 154 (9th Cir. 1957).

In *Pike* v. *Dickson,* 323 F.2d 856 (9th Cir. 1963), the Court recognized the rather elementary proposition that "[t]he conduct of the prosecutor at the trial . . . [can] amount to a denial of due process", and in *Campbell* v. *United States,* 429 F.2d 209 (D.C. Cir. 1970), the Court held the prosecutor's extensive reliance upon an invalid assumption during summation was a denial of due process and required reversal of the conviction. Inflammatory statements during closing arguments, such as the ones in the case at bar, which tend to prejudice defendant's right to a fair trial have been held to be reversible error. *United States* v. *Schartner,* 426 F.2d 470, 478 (3rd Cir. 1970); *United States* v. *Birrell,* 421 F.2d 665 (9th Cir. 1970); *United States* v. *Gambert,* 410 F.2d 383, 384 (4th Cir. 1969); *United States* v. *Hughes,* 389 F.2d 535 (2d Cir. 1968).

In sum, we submit, the circumstance of this case so far depart from the accepted norm, that review is warranted by this Court.

CONCLUSION

Under all the circumstances herein set forth, it is respectfully prayed that a writ of certiorari should issue to review the judgment of the New York Court of Appeals.

Respectfully submitted,

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APPENDIX

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Order Extending Time to File Petition for Writ of Certiorari to September 30, 1972, Dated August 29, 1972 ..... 2a

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Order of New York Court of Appeals, Dated June 1, 1972, 30 N.Y. 2d 816, 334 N.Y.S. 2d 909 (1972)

PEOPLE, etc., Respondent, v. ALEXANDER GRAHAM BELL, Appellant.

PEOPLE, etc., Respondent, v. JAMES LEDES, *Appellant.*

Court of Appeals of New York.

June 1, 1972.

Appeals from the Supreme Court, Appellate Division, First Department, as follows: People v. Bell, 37 A.D. 2d 692, 323 N.Y.S. 2d 641 and People v. Ledes, 37 A.D. 2d 693, 323 N.Y.S. 2d 641.

Order affirmed.

All concur.

Order of New York Supreme Court, Appellate Division, First Department, Dated June 29, 1971, 323 N.Y.S. 2d 641 (1st Dept. 1971)

The PEOPLE of the State of New York, Respondent, v. James LEDES, Defendant-Appellant.

Supreme Court, Appellate Division, First Department, June 29, 1971. E. L. Kaplan, New York City, for respondent. J. W. Heller, New York City, for appellant. Judgment, Supreme Court, Bronx County (McCaffrey, J.), rendered on April 10, 1970, unanimously affirmed. No opinion.

McGIVERN, J.P., and NUNEZ, MURPHY, TILZER, and EAGER, J.J., concur.

Order Extending Time to File Petition for Writ of Certiorari to October 30, 1972, Dated September 29, 1972

SUPREME COURT OF THE UNITED STATES

No. A-254

JAMES LEDES,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including October 30, 1972.

THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 20th day of September, 1972

Order Extending Time to File Petition for Writ of Certiorari to September 30, 1972, Dated August 29, 1972

SUPREME COURT OF THE UNITED STATES

No. A-254

JAMES LEDES,

Petitioner,

v.

NEW YORK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby further extended to and including September 30, 1972.

/s/ THURGOOD MARSHALL
Associate Justice of the Supreme Court of the United States

Dated this 29th day of August, 1972.

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No. 72-661

JAMES LEDES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-661

JAMES LEDES,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, entered June 1, 1972 [30 N.Y.2d 816], unanimously affirming, without opinion, an order of the Supreme Court of the State of New York, Appellate Division, First Department, entered June 29, 1971 [37 A.D.2d 692], which affirmed, also without opinion, a judgment of the Supreme Court of the State of New York, Bronx County, rendered April 10, 1970, convicting the petitioner, after trial by jury, of six

counts of the crime of Buying and Receiving Stolen Property [New York Penal Law §1308] and six counts of the crime of Concealing and Withholding Wrongfully Acquired Property [New York Penal Law §1308], and sentencing him to an indeterminate term of not less than two and one-half nor more than four years in State Prison on each count, such terms to run concurrently.

Jurisdiction

The jurisdiction of this Court is evoked under 28 U.S.C. §1257(3). The order of the Court of Appeals was entered on June 1, 1972. The order of the Appellate Division was entered on June 29, 1971. An order extending time to file this petition to September 30, 1972 was signed by Mr. Justice Marshall on August 29, 1972; a similar order further extending time to October 30, 1972 was signed by Mr. Justice Marshall on September 20, 1972.

Questions Presented

In our view no substantial federal questions have been presented in this case. Nevertheless, we shall list the claim petitioner has set forth:

> Should this Court let a conviction stand where petitioner's fundamental right to a fair trial was denied by the combination of an inflammatory and prejudicial summation by the prosecutor and by seriously erroneous rulings by the Trial Court?

Statement of the Case

Edward Esposito, Alexander Graham Bell, Joseph Arrighi and James Ledes, petitioner herein, were indicted by the Bronx County Grand Jury on May 6, 1968 for the crimes of Buying and Receiving Stolen Property (seven counts) and Concealing and Withholding Wrongfully Acquired Property (seven counts) in violation of former New York Penal Law §1308. Esposito passed away prior to the trial. The case against Arrighi was severed, the People having promised to dismiss the charges against him upon his having agreed to testify against the other defendants. Petitioner and Bell went to trial on February 9, 1970.

At trial, the prosecution showed, largely through the testimony of Joseph Arrighi, that on July 5, 1967, Arrighi agreed to lease his garage to Edward Esposito so that the latter could store some merchandise there. The next day, a rented truck operated by Alexander Graham Bell and containing some $15,000 worth of stolen women's apparel was backed into Mr. Arrighi's garage. Esposito opened the truck doors and assisted Bell in carrying the stolen goods upstairs into Arrighi's apartment.

Later that evening, the petitioner arrived at the Arrighi apartment and immediately began to discuss the merchandise with Esposito. The two went from room to room examining the garments which were lying all over the place. As the negotiations continued, Esposito, after displaying some bills of lading, informed petitioner that the merchandise was worth $40,000 but that he would sell it all to the petitioner, a carpenter by trade, for $4,000. It was at this

point that Arrighi realized that the garments had been stolen, the price not appearing feasible. Although Esposito indicated his dissatisfaction with the price because he had to pay Bell for driving the truck, he agreed to it after petitioner said he would take care of Bell. Petitioner then gave Esposito $600 as an advance. They then sorted some of the clothes, including approximately six hundred housecoats, for the petitioner to use as samples to show to prospective customers and put them into two cartons, leaving the rest to be picked up by a truck petitioner indicated would be there the following Tuesday. Taking the filled cartons downstairs, petitioner and Esposito put them into the trunk of petitioner's car, after which they both left.

On July 8, 1967, two detectives arrived at Arrighi's apartment to investigate a complaint concerning stolen merchandise. Arrighi let them in and the officers discovered the clothing, with names and tags still on, spread out all over the place. When asked where the garments came from, Arrighi replied they belonged to "Jimmy and Eddie," and that he was minding the goods for them. Shortly thereafter, petitioner and Esposito arrived, each carrying four flat unassembled cartons. Both petitioner and Esposito told the officers they had come because they had heard that they could get a good buy there. All three men were arrested; Bell was subsequently apprehended.

Petitioner testified in his own behalf. He stated that on July 6, 1967, Edward Esposito, whom he had known for a year, asked him to meet with a friend that had some women's and girls' clothes purchased at a closeout. At a restaurant, Esposito introduced petitioner to Joseph Arrighi who mentioned the clothing and asked if petitioner

wanted to buy some for his wife. Two days later, petitioner and Esposito drove to Arrighi's house. After parking, petitioner saw Esposito was carrying some boxes and assisted him in bringing them into the building. Arriving at the top of the stairs, they were confronted by two police officers. When asked what he was doing there, Ledes answered "I heard there was something to buy for my wife and kids there * * * I'm really sorry * * * Forget you saw me. Just let me walk out the way I walked in."

Proceedings on the Motion to Amend the Remittitur

Petitioner moved in the New York Court of Appeals to have the remittitur amended. Throughout the proceedings below, the People maintained that petitioner had failed to avail himself of appropriate state procedures to preserve the issues raised on appeal. Aware that the Court of Appeals may nevertheless overlook procedural requirements and review a record where a defendant's right to a fair trial is questioned, the People also opposed petitioner's motion to amend the remittitur on the ground that the alleged errors did not rise to the level of a denial of constitutional notions of fundamental fairness. The Court of Appeals granted the motion in an order dated November 2, 1972 [—— N.Y.2d —— (1972)], amending the remittitur by adding thereto the following:

> "Upon the appeal herein there was presented and necessarily passed upon the following question under the Constitution of the United States, viz.: Whether appellant was deprived of due process under the Fourteenth Amendment to the Constitution of the United States."

POINT ONE

Petitioner was not deprived of due process under the Fourteenth Amendment to the Constitution of the United States.

From the amended remittitur we cannot ascertain whether the Court of Appeals considered each individual claim advanced by petitioner or weighed the pervasive impact of the alleged errors on petitioner's right to a fair trial. It is our position that, treated singularly, the claimed errors do not in any way suggest that the trial failed to comport with contemporary standards of due process. Nor would the accumulation of innocuous error lead to the conclusion that defendant was deprived of the protection afforded him by the Fourteenth Amendment. With this in mind, we turn our attention to the contentions advanced by petitioner.

A. Statements of the Prosecutor in His Summation Were Not Prejudicial.

During the course of the defense summation, comments were made that the People's principal witness, Joseph Arrighi, "did not testify until he elicited a promise from the Prosecutor, that the charges against him would be dismissed" and that "we all know what Joseph Arrighi got for his testimony". This prompted the Prosecutor to offer the following explanation in his summation as to why the People chose Arrighi to turn State's evidence and decided to prosecute:

> "Well, you might ask yourselves, why Joseph Arrighi * * *?

"Well, first of all, Gentlemen, the People must look at who is in the center of this particular crime. Who is the prime perpetrator? James Ledes.

"Now Joseph Arrighi is in it. But you have to go after the people that are at the center of the crime. Another consideration, you have to look at a man's criminal background. Does a man have prior conflict with the law? Again, James Ledes fits the bill.

"So this is the type of man you go after, and you utilize the testimony of a man like Arrighi."

Petitioner now seizes upon this remark to argue that the People used his criminal background as a vehicle by which the jury could infer that he had a propensity to commit the crimes with which he was charged. Rather than suggesting criminal predisposition, such statement can clearly be seen as a warranted response to the comments made by petitioner's own counsel on the issue of the People's motivation for using Arrighi [see, *Buchalter* v. *People of the State of New York,* 319 U.S. 427 (1943); *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940); *United States* v. *Ramos,* 268 F.2d 878 (2d Cir. 1959)]. Furthermore, the Court in its charge curatively instructed the jury:

"If any witness has been previously convicted of a crime, you may consider that in determining what weight, what credit, and what belief you will attach to that witness's testimony, in the case."

This instruction indicated to the jury the proper treatment to be accorded petitioner Ledes' criminal background. Such instruction was sufficient to counteract whatever may have been the effect of the District Attorney's comments with regard to such background. We also note that Ledes had taken the stand in his own defense thus putting his credi-

bility in issue, and the Prosecutor's comment was a proper evaluation of such credibility and of the weight to be afforded such testimony. That no error flowed from this remark is evidenced by the failure of petitioner to object thereby rendering the issue unavailable for appellate review [*People* v. *Vidal*, 26 N.Y.2d 249 (1970)].

At another point in his summation, the District Attorney stated:

> "All right, was Arrighi telling the truth? Let's get right down to it. You bet he was telling the truth. Don't take my word for it, but listen, gentlemen, listen if you will."

The Prosecutor then engaged in a review of Arrighi's testimony to which petitioner offered no objection. By this comment, all the District Attorney was stating was, in different words, that there existed sufficient credible evidence to establish petitioner's guilt beyond a reasonable doubt. He was not seeking to make himself an unsworn witness, nor was he supporting his case by invoking his own veracity and position. On the contrary, the particular language negates any such inference that the Prosecutor was speaking from personal knowledge. Therefore, we submit that petitioner's contention that the Prosecutor was improperly vouching for the credibility of his witness is without merit. In any case, such a passing remark under these circumstances could not constitute error [*Lawn* v. *United States*, 355 U.S. 339, 359-60, n.15 (1958); *Jackson* v. *United States*, 359 F.2d 281 (2d Cir. 1964)]. This conclusion gains support from defense counsel's failure to object to the comment.

Nor did any prejudice result from the following comment of the Assistant District Attorney:

> "Let's see if he [Ledes] told any other falsehoods. On direct examination he stated that he was the owner of his business. Well, the People don't go into this type of case without investigating a man and conducting an investigation."

Contrary to petitioner's contention, the jury was not led to believe the Prosecutor was in possession of additional facts not presented to them. The People did not imply personal knowledge from undisclosed sources nor did they rely upon the integrity of their office [*United States* v. *Hyshohion*, 439 F.2d 274 (2d Cir. 1971)]. In any event, the jury was promptly instructed to disregard the comment as to an "investigation" [*People* v. *Gowsky*, 244 N.Y. 451 (1927)].

It is also contended that the Prosecutor made unfair comment on the evidence when he said of the petitioner:

> "Another deliberate falsehood, another indication of his failure to tell the truth. Another factor for you to consider, of whether he is the type of man to tell the truth under oath, in this type of a case."

Besides the fact that petitioner never objected to the remark, in no way could this be deemed to have denied him a fair trial. All that the statement did was what all summations are permitted to do—draw logical deductions from the testimony and evaluate a defendant's credibility. A Prosecutor in his closing remarks has the prerogative of commenting upon the evidence and estimating its weight and probative value [*People* v. *Doody*, 172 N.Y. 165 (1912);

see, also, *United States* v. *DeFillo*, 257 F. 2d 835 (2d Cir. 1958)].

The People's remarks which are attacked should not be lifted out of context, thereby distorting the impression to be derived from a consideration of the entire summation [*United States* v. *Angelet*, 231 F. 2d 190 (2d Cir. 1956) *cert. den.* 351 U.S. 952 (1956)]. Viewed in the context of the entire summation, such comments did not prejudice petitioner's rights to a fair trial. However, should this Court disagree and be of the opinion that the People's statements were improper, it is submitted that any error flowing therefrom was, in view of the overwhelming proof of guilt of the crimes charged, harmless beyond a reasonable doubt [*Chapman* v. *California*, 386 U.S. 18 (1967); *People* v. *Schwartzman*, 24 N.Y. 2d 241 (1969); New York Code Crim. Proc. §542].

B. Inquiry into the Conversation Between Arrighi and Defense Counsel in the Latter's Office Was Properly Denied.

Prior to the introduction of any evidence and in the absence of the jury, defense counsel, Mr. Altman, made the following statement to the Court concerning the fact that Arrighi had previously approached him and questioning whether the conversation that ensued was subject to the attorney-client privilege:

> "Mr. Altman: • • •
>
> "One of the People's witnesses that will, I expect will be called, had come to me to ask me to represent him in this case,—
>
> "The Court: Yes.

"Mr. Altman: —on the original indictment. Now I explicitly explained to him at the time that I could not represent him, because there was a conflict of interest. But he made certain statements to me, which were, I believe, contrary to what he would testify to at trial. Now I don't know what he is going to testify to at the trial. I am concerned about a limitation, in my cross-examination, which may be imposed by the attorney-client confidential communication privilege. I don't know how far, in this circumstance, it would extend.

"Now I had told him that I was unable to represent him, because of the conflict, and much of what he discussed wtih me was elicited, or came from him after I had told him this. Now I don't know how far I can go on this, and rather than going into the matter once he is brought to the stand, I thought I would broach the problem to Your Honor at this time."

The District Attorney responded that:

"Mr. Cantor: • • • after speaking with Mr. Arrighi, Your Honor, I am led to believe that no statements whatsoever were made by Mr. Arrighi to Mr. Altman; that the sole purpose of the meeting was Mr. Altman's calling Mr. Arrighi there, and then referring Mr. Arrighi to another attorney, to an attorney other than Mr. Altman, because of the reason that Mr. Altman would have a conflict. But Mr. Altman, according to Mr. Arrighi, and my interviewing of the witness, Mr. Altman was showing an amicability towards Mr. Arrighi. He wanted him to be placed in the hands of a workable collegue [*sic*], shall we say, someone who would work hand-in-hand with Mr. Altman on this defense."

The Court was "not prepared to make any ruling at this point" but understood that "so long as we give you

[defense counsel] an opportunity between the direct and cross, to be satisfied by a ruling of the Court, that will take care of your position." Although counsel agreed, he did not seek such a ruling between direct and cross-examination.

During the People's case-in-chief, Arrighi stated that, after being arrested, he had gone to Mr. Altman's office to see him at Jimmy Ledes' request. Bell and Ledes were there with Mr. Altman. Arrighi did not request that Mr. Altman represent him. On cross-examination, defense counsel sought to elicit from Arrighi greater detail as to what transpired in his office. The People's objections to this line of questioning were sustained. Nor was Mr. Altman, who testified on behalf of both defendants, permitted to testify concerning the circumstances surrounding Arrighi's visit to his office.

Contrary to petitioner's contention, the attorney-client privilege was properly invoked. Even though Arrighi stated he did not request petitioner's lawyer, Mr. Altman, to represent him in the case, Arrighi, being at the time a defendant in the criminal action, may nevertheless have been seeking legal advice from him, a relationship countenanced by the privilege [see, *Bacon* v. *Frisbe,* 80 N.Y. 394 (1880); *Richardson on Evidence,* §428; *Wigmore on Evidence,* §2292]. Such a conclusion is reasonable in view of the presence of two of Arrighi's co-defendants in the office at the time.

The rule advanced by petitioner that statements qualifying as privileged lose their protected status when the attorney asserts he cannot represent the declarant would

defeat the public policy of free disclosure by persons seeking professional legal advice. As long as the disclosures are made in reliance upon the privilege initially existing, the timing of an attorney's statement that he cannot act as counsel should not be allowed to strip of their privileged status any additional declarations uttered during the same meeting but subsequent in time [*Doheny* v. *Lacy*, 168 N.Y. 213 (1901); *Hurlburt* v. *Hurlburt*, 128 N.Y. 420 (1891); see, also, *In re Bonanno*, 344 F. 2d 830 (2d Cir. 1965)].

Nor does the presence of Bell and petitioner vitiate the privilege by negating the element of confidentiality. Since they were co-defendants of Arrighi, any discussion by Arrighi of the pending criminal case should be deemed to have occurred in the course of a "peculiar relation of confidence" in which Bell and petitioner shared [*Continental Oil Co.* v. *United States*, 330 F.2d 347 (9th Cir. 1964); *People* v. *Buchanan*, 145 N.Y. 1, 26 (1895), *cert. den.* 158 U.S. 31 (1895)].

Defense counsel was afforded the opportunity by the Court to seek a ruling as to whether the privilege obtained and, at the same time, to move to offer sworn testimony as to the conversations in question at a hearing in the absence of the jury. His failure to avail himself of such opportunity lends support to the validity of the Court's ruling that the privilege was properly invoked. Also, we note that at no point, neither during the questioning of Arrighi nor during petitioner's motions at the conclusion of the evidence, did petitioner except to the Court's refusal to admit the testimony at issue. Such failure renders the issue unavailable for appellate review.

Nevertheless, in the event that the privilege did not obtain and that the ruling below was erroneous, we would submit that such error was harmless beyond a reasonable doubt, being collateral to the material issues involved and likely to confuse the jury [see, *People* v. *Ramistella,* 306 N.Y. 379 (1954); *Richardson on Evidence* §502, 503].

C. The Charge Was Free of Error

The Court instructed the jury on the issue of criminal intent as follows:

> "Guilty knowledge means not only actual knowledge but also constructive knowledge, and this may be shown by the establishment of circumstances from which guilty knowledge may be fairly inferred.
>
> "Guilty knowledge need not be direct knowledge, as a person would have if he was an eyewitness to a larceny. It is sufficient if the attending circumstances are such as to furnish defendant with knowledge that the property had been stolen."

Petitioner claims that the definition of guilty knowledge as being "not only actual knowledge but also constructive knowledge" is a misstatement of New York law.

In evaluating the quantum of knowledge necessary to convict of a charge involving stolen property, the New York Court of Appeals in *People* v. *Dowling,* 84 N.Y. 478, 485 (1881), held that "the direct proof of knowledge of the larceny is not needed to convict of receiving stolen goods with guilty knowledge. That knowledge may be gathered from the circumstances of the case, of whcih one is the buying the goods at an under valuation" [see, *People* v. *Silinsky,* 235 A.D. 289 (1st Dept. 1932)]. So too, this

Court in *Rosenthal* v. *New York*, 226 U.S. 260, 267-8 (1912), citing *People* v. *Dowling, supra*, has interpreted "the decisions of the courts of New York [to] hold that actual knowledge of the fact that the property is stolen is unnecessary, and that anything in the circumstances that would put an honest or prudent man upon inquiry is sufficient to warrant a conviction."

In view of the context of the entire charge in which the Court used such phrases as "the establishment of circumstances from which guilty knowledge may be fairly inferred "and " if the attending circumstances are such as to furnish a defendant with knowledge," the term "constructive" is not a misstatement of the type of knowledge required. One word should not be lifted out of context for the implication accompanying such a practice may indeed be very remote from the clear impression to be derived from a consideration of the whole effect [*United States* v. *Hernandez*, 361 F. 2d 446 (2d Cir. 1966); *People* v. *Donaldson*, 295 N.Y. 158 (1946)].

The Court also charged that "since Arrighi is an accomplice, you must examine his testimony very closely, and receive it with great caution". Such is sufficient protection to assure that an accomplice's testimony will be weighed carefully [see, *Cash* v. *Culver*, 358 U.S. 633 (1959)]. There is no need to charge, with respect to an accomplice, that he has an "interest" in the case and might have an "inducement" to testify falsely. The failure to so charge did not prejudice the petitioner. The Court's otherwise proper instruction was not rendered insufficient by the omission of the additional, superfluous, albeit correct, instruction offered by the petitioner.

In neither instance did petitioner except to the charge or request the Court to charge differently than it did. This failure precluded him from raising the objection on appeal to the Court of Appeals [New York Code Crim. Proc. §420-a; *People* v. *Vidal*, 26 N.Y. 2d 249 (1970); *People* v. *Reynolds*, 25 N.Y. 2d 489 (1969); *People* v. *Baker*, 23 N.Y. 2d 307 (1968); *People* v. *Cohen*, 5 N.Y. 2d 282 (1959)]. It has been held by this Court on numerous occasions that a litigant must follow state procedures in raising a federal question and that, when required by state practice, the federal question must be raised before the trial court [*Williams* v. *Georgia*, 349 U.S. 375 (1950); *Brown* v. *Massachusetts*, 144 U.S. 573 (1891)]. If reasonable state procedural requirements are not observed, as in the instant case, the Court will decline to exercise jurisdiction [*Ferguson* v. *Georgia*, 365 U.S. 570 (1960); *In re Lamkin*, 355 U.S. 59 (1957)].

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1972